Community Bus Lines/Hudson County Executive Express *and* Jesus Pimentel *and* Hernan Ocampo. Cases 22–CA–25124, 22–CA–25209, and 22–CA–25504

March 26, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On June 12, 2003, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and Charging Party Hernan Ocampo filed exceptions and supporting materials.[1] The Respondent also filed a reply brief to the General Counsel's brief and an answering brief to Charging Party Ocampo's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order.[3]

The Respondent operates a shuttle bus service transporting passengers between Jersey City, New Jersey, and New York City. It contends that the owner-operators who comprise approximately one-half of its drivers are independent contractors and consequently are not protected by the Act. The Respondent also contends that it did not act unlawfully by discharging owner-operator Jesus Pimentel, by preventing owner-operator Hernan Ocampo from using substitute drivers, or by later constructively discharging Ocampo. As explained below, we affirm the judge's threshold finding that the owner-operators are employees under Section 2(3) of the Act, because we conclude that the Respondent, which bears the burden of proof on this issue, failed to demonstrate that the owner-operators are independent contractors. We also affirm the judge's conclusions, for the reasons stated by him, that the Respondent violated Section 8(a)(3), (4), and (1) of the Act in discharging Pimentel, but that it did not violate the Act with respect to Ocampo.

I.

The Respondent runs minibuses carrying passengers between Jersey City's Journal Square bus terminal and New York City's Port Authority bus terminal, stopping to load and unload passengers at various points along the route. The Respondent employs 13 drivers to drive minibuses owned by the company, and it contracts with approximately 10 owner-operators to service these routes with their own vans and minibuses, driven either by the owner-operators themselves or by substitute drivers.

Owner-operators drive the same routes as employee drivers, in the same way. All buses and vans in use, regardless of ownership, have the Respondent's name on them, but they are not uniform in color or style. The owner-operators may also put their own names on their buses, along with the Respondent's name. While they are working, all drivers, including the owner-operators, maintain regular contact with the Respondent's dispatchers, who oversee the distribution of buses along the route and the loading and unloading of passengers at the Jersey City and New York City bus terminals. The Respondent's owner and president, Jorge Bedoya, also spends most of his work time at the bus terminals, ensuring the smooth progression of buses and loading of passengers. Employee drivers begin and end their workday at the Respondent's office, while owner-operators need not do so, as they may garage their buses wherever they wish. Owner-operators, unlike employee drivers, are responsible for gasoline and maintenance costs related to their buses.

Unlike employee drivers, the owner-operators do not collect wages or benefits from the Respondent. Instead, they collect fares from passengers and pay the Respondent a monthly "corporation fee" for the use of its routes and its gates at the bus terminals. The Respondent sets the fare collected by all drivers, which many passengers pay by discounted tickets purchased in advance from the Respondent. The owner-operators must honor these tickets and may return them to the Respondent as payment (at the discounted purchase price) toward the owner-operators' corporation fees. While the Respondent pays insurance premiums covering the employee

[1] The Respondent has argued that Ocampo's statement and attached packet of documents do not constitute exceptions under Board Rules, but it has not filed a motion to strike them. In view of Ocampo's pro se status and limited English proficiency, we elect to apply our rules liberally and consider Ocampo's statement as exceptions. However, we shall disregard any of the supporting materials included with these exceptions, to the extent that they contain information that has not been previously introduced as evidence at the hearing.

[2] The Respondent and Charging Party Ocampo have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall substitute a new notice to employees that includes the customary expunction language inadvertently omitted by the judge.

drivers of its vehicles, the owner-operators pay the Respondent for their insurance at the same cost per vehicle as for the Respondent-owned buses, and the Respondent issues a check in the same amount to the insurance company.[4]

The Respondent has imposed discipline on owner-operator vehicle drivers. In March 2001, 9 months before Pimentel's termination, the Respondent suspended him for confrontations with other drivers and for verbally attacking the Respondent's operations manager, Amy Vidal. Also in the first half of 2001, the Respondent terminated the employment of at least two substitute drivers, Jairo Tejeiro and Patricio Guadalupe, who drove vehicles owned by owner-operators. According to Tejeiro, his discharge letter, which was signed by Vidal, stated that his discharge was for infractions against coworkers, not cooperating with dispatchers, and breaking the rules of the company.[5]

II.

"[I]n determining whether an individual is an employee or an independent contractor under Section 2(3), the Board applies the common-law agency test and considers all the incidents of the individual's relationship to the employing entity." *BKN, Inc.*, 333 NLRB 143, 144 (2001) (citing *Roadway Package System, Inc.*, 326 NLRB 842, 850 (1998)). See also Restatement (Second) of Agency § 220.

Under well-established Board law, the party asserting that alleged discriminatees are independent contractors bears the burden of proving such status. *BKN, Inc.*, 333 NLRB at 144. On the record here, we conclude that the Respondent has failed to carry its burden.

The record contains some evidence to support the Respondent's contention that the owner-operators are independent contractors. For instance, the owner-operators drive their own buses and vans, and they bear the responsibility for such costs as insurance, maintenance, and gasoline. Further, the Respondent's only income from owner-operators is a flat monthly fee, which is independent of the owner-operators' gross earnings.[6] Nevertheless, we find that these facts are insufficient to meet the Respondent's burden in this case, in light of the evidence introduced by the General Counsel and the Respondent's failure effectively to counter it.

The General Counsel presented evidence supporting the employee status of the owner-operators. For instance, the owner-operators' work is the precise business of the Respondent, transporting passengers between particular points, along particular routes, at fares (including discounts) established solely by the Respondent. The owner-operators do this work side by side with employee drivers and subject to the shared supervision of the Respondent's dispatchers. Moreover, the Respondent has imposed discipline on owner-operator vehicle drivers, e.g., by suspending Pimentel, and has discharged substitute drivers Tejeiro and Guadalupe.[7] Also supporting a finding of employee status is that many of the owner-operators have held their positions for many years.

The Respondent has failed to counter this evidence of employee status, either by credible testimony[8] or by documentary evidence. Further, the Respondent has not offered into evidence any contract that it entered into with owner-operators; thus, it has failed to demonstrate that the parties believed they were creating an independent contractor relationship.[9]

Finally, the Respondent's president and owner, Jorge Bedoya, failed to testify at the hearing, in disregard of the General Counsel's subpoena. This led the judge to infer that Bedoya's testimony would not have been fa-

[4] The New Jersey Department of Transportation (DOT) requires that all drivers operating on behalf of a particular bus company be covered under the same insurance policy; thus, owner-operators' insurance premiums are identical to those the Respondent pays on behalf of employee drivers. The DOT also requires all bus companies to submit daily work records showing each driver's worktime and mileage driven.

[5] The record does not reflect the reasons given for Guadalupe's discharge, but that discharge, along with several others, was the subject of an unfair labor practice proceeding, and Guadalupe was eventually reinstated by Board order. *Community Bus Lines*, 2002 WL 62835 (Jan. 14, 2002), enfd. by unpublished Board Order Mar. 5, 2002; enfd. by summary judgment Docket No. 02-2701 (3d Cir., Sept. 11, 2002).

[6] The Respondent puts great emphasis on this one factor in attempting to establish independent contractor status. The Respondent relies on *Checker Cab Co.*, 273 NLRB 1492 (1985), and *Air Transit*, 271 NLRB 1108 (1984), in which the Board held that generally where no correlation exists between an employer's revenue and the fares collected by the drivers, the drivers are independent contractors. Those cases, however, are factually distinguishable. The drivers at issue in those cases were taxicab drivers who had discretion over the manner in which they conducted their driving duties, as opposed to the drivers at issue here who drove one particular, employer-designated route. Moreover, in the instant case, any opportunity for entrepreneurial gain created by the flat-rate fee system is overborne by the ample evidence of employer control and other incidents of employee status.

[7] In the absence of evidence to the contrary, the Respondent's exercise of control by means of discipline not only over its own acknowledged employees but also over the owner-operators and their substitute drivers indicates that the Respondent treated all the drivers as employees. See *Stamford Taxi, Inc.*, 332 NLRB 1372, 1373, 1385 (2000).

[8] The judge placed no reliance on Vidal's testimony, which was inconsistent with the evidence as to Pimentel's suspension, that the discipline of owner-operators was limited to terminating them for nonpayment of the corporation fee or for losing their driving license.

[9] In the absence of this contract, the Respondent has failed to substantiate its claim that the owner-operators are free to use their vehicles for other work when they are not driving for the Respondent. The judge found no evidence of such actual use.

vorable to the Respondent's case. The Respondent's willful decision to avoid testimony by its highest officer, an individual presumably knowledgeable about the facts at issue, is particularly significant where, as here, the Respondent bears the burden of proof. We therefore conclude that the judge properly drew an adverse inference about what would have been the substance of Bedoya's testimony.[10] Thus, while we do not agree with the judge that there is "little difficulty in finding [the owner-operators] to be Section 2(3) employees," we will treat them as employees because we conclude that the Respondent has not affirmatively shown that they are independent contractors based on the entirety of the evidence.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Community Bus Lines/Hudson County Executive Express, Jersey City, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. March 26, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting a union or for filing unfair labor practices with, or giving testimony to, the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days of the Board's Order, offer Jesus Pimentel full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed, and WE WILL make him whole for any loss that he suffered as a result of the discrimination against him.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, and WE WILL, within 3 days thereafter, notify Jesus Pimentel in writing that we have done so and that WE WILL NOT use the discharge against him in any way.

COMMUNITY BUS LINES/HUDSON COUNTY EXECUTIVE EXPRESS

Bert Dice-Goldberg, Esq., for the General Counsel.
Alan Model, Esq. (Grotta, Glassman & Hoffman, P.A.), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ**,** Administrative Law Judge. This case was heard by me on April 1, 2003, in Newark, New Jersey. The amended consolidated complaint herein, which issued on February 27, 2003, and was based upon unfair labor practice charges that were filed by Jesus Pimentel on April 10, 2002,[1] and by Hernan Ocampo on May 28 and November 26, alleges that Community Bus Lines/Hudson County Executive Express (the Respondent), violated Section 8(a)(1), (3), and (4) of the Act by discharging Pimentel on about December 21, 2001, and by refusing to allow Ocampo to use substitute drivers on his bus commencing on about May 17, and by constructively discharging him on about November 20.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[10] Chairman Battista finds it unnecessary to rely on an inference as to what Bedoya's testimony would have been. Suffice it to say that the Respondent failed to meet its burden of proof and that the failure of Bedoya to testify was a part of that failure.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2002.

II. BACKGROUND

Pursuant to unfair labor practice charges that were filed by Production Workers Union, Local 148, AFL–CIO (the Union), the Region issued a complaint dated September 27, 2001 alleging numerous violations of the Act. At the trial on December 10, 2001, the Respondent withdrew its answer, which resulted in a decision by Administrative Law Judge Howard Edelman, finding that the Respondent had engaged in numerous violations of Section 8(a)(1) and (3) of the Act. This decision was affirmed by the Board, and enforced by the United States Court of Appeals for the Third Circuit on September 11, 2002. One of the many violations found therein is that the Respondent unlawfully suspended Pimentel on March 26, 2001. Further, it was found that the Respondent unlawfully discharged Patricio Guadalupe, who drove for Ocampo, and Jairo Tejeiro, and changed the schedules and shifts of its drivers, including the owner-operators, in violation of Section 8(a)(1) and (3) of the Act. In addition to this unfair labor practice hearing, the Union filed two petitions with the Board seeking to represent the Respondent's drivers.

III. THE FACTS

Respondent's buses provide transportation for commuters from Jersey City, New Jersey, to the Port Authority Bus Terminal in New York City. The Respondent employed about 13 bus drivers at the time in question. During the same period it had about 10 owner-operators operating buses on its route, and the Respondent defends that these owner-operator drivers are independent-contractors, rather than employees under Section 2(3) of the Act. As Pimentel and Ocampo were owner-operators, if Respondent's argument prevails, the complaint must be dismissed even if the 8(a)(3) and (4) allegations have merit.

A. Section 2(3) Employee Status

All of the Respondent's buses, whether operated by its employees or by their owner-operators, operate between the Journal Square Terminal in Jersey City, New Jersey, and the Port Authority Bus Terminal in New York City, from gates that are rented by the Respondent. The drivers pick up and drop off passengers at those locations and points in between. The passengers can pay the fare, presently $2, on the bus in cash, or can use tickets purchased at the terminal at a discount. Both groups of employees are "supervised" by the same two dispatchers who count the passengers and, presumably, ensure that the buses are evenly distributed between the terminals and the points in between. The vehicles employed are minibuses; those operated by employees are owned and maintained by the Respondent. Those operated by the owner-operators are owned and maintained by the owner-operators.

Each of the owner-operators pays a corporation fee to the Respondent in the amount of $810 a month. The purpose of this charge is to reimburse the Respondent for the rent it pays for the gates at Journal Square and the Port Authority Bus Terminal. This is the only income that the Respondent receives from the owner-operators. The other drivers do not pay this corporation fee. Owner-operators, but not the other drivers, also purchase insurance for their vehicles. The amount of the insurance is determined by the insurance company. Up until December 2001, the yearly insurance cost was about $10,000 per vehicle; in December 2001, the insurance cost was increased to $16,000 per vehicle. The cost of insuring the Respondent's buses and the owner-operators' buses is the same, except that the Respondent pays the insurance for its buses. Like the cost of insurance, the insurance company determines how it will be paid and, at the present time, the insurance is paid by a 25 or 33 percent down payment due in December, with about eight equal payments due beginning the following month. Amy Vidal, the Respondent's operations manager, testified that under Department of Transportation (DOT) rules all vehicles and drivers have to be covered under one insurance company. The owner-operators provide her with their ownership title, and she forwards the required information to the insurance company and the DOT. The owner-operators give her checks for the insurance made out to the Respondent and she deposits these checks and makes out a check to the insurance company in the exact amount that the Respondent received.

Owner-operators can terminate their relationship with the Respondent without any notice; Vidal testified that the Respondent can terminate owner-operators for nonpayment of the corporation fee, insurance or, presumably, losing their license, but cannot otherwise discipline owner-operators. However, the decision in the prior matter found that Pimentel was unlawfully suspended. Vidal testified that he was suspended for causing confrontations with other drivers and for verbally attacking her.

The buses are different colors, although they all have the name Community Bus Lines. The owner-operator buses contain the name of the owner-operator as well. The testimony establishes that only one owner-operator, Eduardo Bernal owned more than one bus; Vidal testified that he owned three, and Vidal was only able to name one owner-operator, again Bernal, who established a business name for his operation. The owner-operators can drive their own bus (as 90 percent of them do) or can employ others to drive for them. If they employ substitute drivers, the substitute must give Vidal his/her license, which she forwards to the insurance company. If the substitute is approved by the insurance company, he/she will have a drug and alcohol test. The owner-operators pay for gas and maintenance of their buses and park it overnight wherever they choose. One or two pay the Respondent $100 a month to park at its facility. The Respondent pays no wages or commissions to the owner-operators, does not issue W-2 forms to them, and does not deduct taxes or social security for them. The Respondent's drivers are salaried and the Respondent withholds social security for them, pays the applicable Federal and State taxes and issues them W-2 forms. The Respondent pays for the maintenance, repair, and the gas of the buses operated by these employees. In addition, the Respondent performs a safety evaluation of all of its driver employees. All the drivers are required by the DOT to turn in daily reports listing the hours that they worked each day, their name, the bus number and the mileage. The Respondent does not maintain an attendance policy or work schedule for its owner-operators, nor does it limit the hours they can work. The owner-operators are free to use their bus for charter work during nonworking hours.

B. Pimentel Termination

Pimentel began working for the Respondent as a bus driver in the summer of 1999. He testified that, shortly thereafter, Jorge Bedoya, Respondent's president (who did not testify at the hearing even though he had been subpoenaed by counsel for the General Counsel), told him, "Why don't you buy a bus? I'll sell you a route for $5,000 and you can make more money." At that time, Pimentel bought a bus and became an owner-operator for the Respondent. In about December 2000, he and other drivers began meeting ". . . to be organized, trying to get a union . . . ." When they learned of the Union, he and three or four other drivers went to the Union to speak to the organizer. He signed a union authorization card on February 28, 2001. In addition, the union organizer gave him cards to distribute to other drivers, and he got back about 20 signed union authorization cards, which he returned to the Union. At the first Union meeting there were between 25 and 30 drivers present. The other drivers elected him president of the organizing group. During the prior unfair labor practice case before the Board, he encouraged the other drivers to go to the Board office to give statements to the Board agents. In addition, the Union filed petitions with the Board in March and May of 2001. On those occasions he came to the Board office for the hearings, where he saw Bedoya. He also came to the Board office for the unfair labor practice hearing referred to above. After the Respondent recognized the Union, Pimentel was elected to be one of the representatives to sit with the Union during bargaining, and he was present at two bargaining sessions before the Respondent ". . . walked away from the bargaining table."

As stated above, the yearly cost of insurance for the drivers increased in December 2001, from about $10,000 to $16,000. Pimentel had made all of his insurance payments for December 2000 to December 2001. In addition, he paid his corporation fee on about December 5, 2001, when it was due. He testified that because his insurance was expiring on December 22, 2001, he went to speak to Bedoya on December 20, 2001, to ask about the cost of insurance. At that time he was unaware of the increase in the cost of insurance.[2] Before going to speak to Bedoya in his office, he told Vidal that he wanted to speak to him and she told him to go upstairs to his office; nobody else was present during the conversation with Bedoya. He asked Bedoya how much money he would have to put down for the insurance. "Then he told me he won't renew my insurance because of the trouble I make, and to get out of his office." Pimentel's only response was: "I go to see my lawyer." He testified that he never told Bedoya that the insurance was too expensive, or that he was not going to renew it, and he never spoke to Vidal about the insurance. His last day of driving for the Respondent was on December 22, 2001, when his insurance expired.

Vidal testified that on about December 20, 2001, Pimentel came into her office and told her that he was not going to renew his insurance. She testified that Bedoya was in her office during part of this conversation, but not when Pimentel told her that he was not going to renew his insurance. An affidavit that she gave to the Board states: "Sometime in December 2001, Jesus Pimentel came into the office and told me that he would not renew his insurance. Mr. Bedoya was in my office at the time Pimentel made this statement." In answer to a question from counsel for the Respondent about this incident with Pimentel, she testified that he came into her office and she assumed that he was going to make the down payment for the insurance because he had paid the corporation fee shortly before. Rather, he told her that he was not going to pay because it was too expensive. and that he could obtain his own insurance. She told him that under DOT rules all insurance had to be under one company. Pimentel became loud and she called Bedoya down from his office, and she repeated to Pimentel that all insurance had to be with their carrier and he would have to leave a down payment. He said no, it's too expensive, and left. She testified further that she received notification from the insurance company of the increase on December 17, 2001, and that prior to this incident in her office, Bedoya conducted a group meeting about the increase in insurance cost, and that Pimentel was present at the meeting.

C. Ocampo Discrimination

Ocampo began working for the Respondent in about 1990 as a driver. He owned his own bus. He usually drove in the afternoon and employed two individuals (Jairo Tejeiro and Patricio Guadalupe) to drive his bus in the morning. He testified that he went to seven meetings at the homes of fellow employees where they discussed forming a union. He signed a card for the Union on February 28, 2001. He came to the Board office in March and May 2001, to attend the Board hearings. A few days after one of those hearing days, as he was about to get into his bus, Bedoya said that he was unappreciative and was a traitor. Vidal testified that prior to the filing of the unfair labor practice charges herein, she was unaware of any union activity on the part of Ocampo.

By letter dated May 15, the Respondent's insurance broker wrote to Bedoya:

> The insurance carrier has reviewed the motor vehicle record and driving history for Hernan A. Ocampo. Based upon his driving record and according to the insurance carrier underwriting guidelines, he is ineligible to drive any vehicles insured on your Business Auto policy.
>
> Please forward a written statement confirming the fact that Hernan A. Ocampo will not be driving. Failure to receive the letter within 5 days will result in the cancellation of your insurance policy.

[2] In an affidavit given to the Board on April 22, Pimentel states, inter alia:

> On about December 20, 2001 I went to speak to Jorge Bedoya, the President of the Employer, regarding renewal of my insurance. The owner-operators were insured through the Employer and the insurance was about to expire in a couple of days. The Employer had given a copy of a letter sent by his insurance broker to one of the drivers. The letter, addressed to Bedoya, said something like "according to the conversation we had on the telephone, the insurance for owner-operators will cost $16,000."

Pimentel was questioned about this letter and affidavit on cross-examination and testified that he did not see this letter until after he was fired.

On May 17, Vidal wrote to Ocampo:

> Please be advised that on May 17, 2002, this company's insurance [sic] has advised this office that according to the Insurance guidelines and your driving record, you are ineligible to drive any vehicle insured on our business Auto Policy. Please see attached letter from our business Insurance Company.
>
> Upon receiving this notice, please contact this office immediately to discuss this matter further.

Ocampo, whose testimony was often confused, testified that upon receiving these letters he went to the Respondent's office with his wife and Guadalupe. When they arrived, Vidal called Bedoya, who came down to the office. Ocampo asked him why he was sending him the letters, and Bedoya said that, according to their agreement with the insurance company, he could not drive anymore because he had nine points on his license. Ocampo said that his "license was clean" and that he would go to Trenton to prove it.[3] Bedoya then said that "what was happening was because I was with the terrorists and the Taliban, and that he knew that I was in the Union." Ocampo then said that he would get another driver to drive for him, and Bedoya said that he couldn't, that he was tired of having Taliban terrorists in the company. If he got somebody to drive for him, it had to be a driver from within the company who was not in the Union. Shortly thereafter, Ocampo got Raphael Salinas, who had been driving for Bedoya, to operate his bus in the afternoon, and he drove the bus for about a month. Ocampo testified:

> Q. And prior to driving your bus, did he get Mr. Bedoya's approval?
>
> A. That's from Mr. Bedoya from the insurance [sic] . . . if the insurance accepted it, that he could drive.

After Salinas stopped driving his bus, Ocampo got Jose Apolaya to drive his bus in the afternoon for about a month. In addition, from February through November, with a few exceptions, Guadalupe drove his bus in the morning and in the afternoons on Fridays. The individuals who drove his bus kept one-half of the fares that they received, as payment for driving for him. Ocampo testified that during this period the Respondent rejected two drivers—Jairo Tejeiro and Luis Valderrama—who had agreed to drive his bus.

By letter dated September 18, Vidal wrote to Ocampo, inter alia:

> Please be advised that as per your Lease Agreement with this company all Corp Fee payments are due every 7th of every month and your Liability Insurance for your vehicle is due every 15th of every month. However, as of today's date you have not forwarded any payment since July 16, 2002 and have not responded to our notices dated July 16, 2002 and August 27, 2002. Therefore, effective September 23, 2002 your Lease Agreement and your Liability insurance with this company will be terminated for noncompliance and nonpayment.
>
> Please follow the proper procedures below due to your termination.
>
> Take out all company logo off your vehicle. [sic]
>
> Take out company name off your vehicle.
>
> Do not attempt to pick up passengers at our Company Platforms.
>
> Your vehicle must be Posted Out of Service by the NJDOT.

Guadalupe, who was a discriminatee in the prior case, testified that he began driving for Ocampo in February 2001, from 6 a.m. to 1 p.m., Monday through Friday. At another point in his testimony, he testified that he began driving for Ocampo in February 2002. He was present with Ocampo when he met with Bedoya and Vidal at the Respondent's office on about May 22. Ocampo showed them the May 15 and May 17 letters. "Mr. Bedoya said that he couldn't do anything, that it was the insurance that was ordering him; not him but it was the insurance." Ocampo replied that the insurance was not saying that he was out of the job, but was just recommending that he couldn't drive the bus. Ocampo then said that if he wasn't working he couldn't cover the expense of the bus. Bedoya responded that it wasn't his problem, that the insurance company was ordering him out. Ocampo then said: "If I can't work, let me put a driver on the bus." Bedoya responded: "I don't want Talibans, I don't want terrorists, I don't want unions to come in here." After that, he and Ocampo left. He continued driving Ocampo's bus after that. On a morning in September he was approached by Bedoya who told him that he could not continue to drive Ocampo's bus. When he asked why, Bedoya said that the "bus was out because Mr. Ocampo was not paying," and that Ocampo had a letter giving the reasons. About a month later, Apolaya, who was driving for Ocampo, asked Guadalupe if he (Guadalupe) could drive Ocampo's bus in the mornings again, and he did so between October and November, when Ocampo took his bus out of Respondent's service.

Vidal testified: "his vehicle was insured, he was not." She testified further that the procedure she employed with the May 17 letter to Ocampo was the same procedure she employed with all drivers who had problems with insurance. In fact, with Ocampo, she called the insurance company to ask if they could put him on probation, instead of canceling his insurance, but she was told that they wouldn't do so because he had previously been on probation twice. Ocampo came to her office with Guadalupe shortly after receiving the May 17 letter; Bedoya was also present. Ocampo asked her why his insurance was cancelled. Vidal called the insurance company and they faxed her his record which stated that he was involved in two accidents and had a couple of moving violations. Bedoya never said anything about the Taliban or terrorists, and both she and Bedoya recommended that he find another driver as a substitute, and did not limit him in whom he could use. Ocampo then told her that Guadalupe would be operating his bus, although he did not say whether it was for the morning or afternoon, and Vidal told him that was no problem as Guadalupe was already

[3] At the hearing, counsel for the General Counsel stated that he was not questioning the authenticity or the good faith of the insurance company's May 15 letter.

under the insurance. Between that meeting and November, she never refused any driver that Ocampo asked to use. Valderrama and Tejeiro were acceptable to the Respondent because they had driven buses for the Respondent and were acceptable to the insurance company. She testified further that she never told Ocampo that the Respondent was taking his bus out of service. In fact, the first she knew that he was no longer operating his bus for the Respondent was on about December 3, when she received a telephone call from a representative of the DOT saying that Ocampo had cancelled his lease agreement with the Respondent. Sometime in November, Ocampo came with his wife and driver Jose Apolaya to speak to her. They asked if they could pay something so that his lease would not be cancelled. Vidal said that would be fine, and they paid her $411 on that day, and they agreed that they would pay $405 per week until the balance was paid in full no later than December 22. On November 27, Vidal sent a statement to Ocampo; it states that he paid the $411 balance, and that as per their agreement, the November and December corporation fee must be paid no later than December 22, and there would be no exceptions. The scheduled payment is listed as $405 per week until paid in full by December 22. The statement also lists $810 due for the corporation fee for November and $810 as due for December.

IV. ANALYSIS

Section 2(3) of the Act states that the term "employee" shall include any employee, but shall not include "any individual having the status of an independent contractor." In *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968), the Court stated:

> The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. [Footnote omitted.] And both petitioners and respondents agree that the proper standard here is the law of agency. Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.

The Court further stated that in applying this common law test, "all the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law principles." The Court found the following to be "decisive factors" in finding employee status: the agents were an essential part of the company's operation, rather than operating their own independent business; they were trained by the company's supervisory personnel; they did business in the company's name and ordinarily sell only the company's products; their commission plan was promulgated and changed unilaterally by the company; they account to the company for the funds that they collect; they participate in the company's vacation, group insurance and pension fund, and they may remain with the company as long as their performance was satisfactory.

Two recent cases on the subject, *Roadway Package System, Inc.*, 326 NLRB 842 (1998), and *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998), are helpful herein because they come to opposite conclusions, *Roadway* finding employee status and *Dial-A-Mattress* finding independent contractor status. I believe that the Respondent's employees are clearly more identifiable with the *Roadway* employees, and I have little difficulty in finding them to be Section 2(3) employees. The Respondent's owner-operators drive buses in the exact same manner as the Respondent's other drivers. They are dispatched from the terminals by the Respondent's dispatchers, along with the Respondent's other drivers, pick up and drop off passengers at the same locations, and charge the same fare for transportation as the Respondent's other drivers. The only difference is that the owner-operators name is on the side of the bus, alongside the Respondent's name. This is the same business that the Respondent is engaged in, as compared to *Dial-A*-Mattress, where the owner-operators delivered the products sold by the employer. Although the Respondent's owner-operators can employ others to drive their buses, can incorporate and can use their bus for other purposes when not operating on the Respondent's routes, apparently only Ocampo and Bernal used others to drive their buses, and Vidal could name only one owner-operator, Bernal, who established a business name for his bus and owned more than one bus. The Respondent failed to produce any evidence of drivers who used their bus for other businesses. As the Board stated in *Roadway*, at 853: "Other indicators of entrepreneurship, such as performing outside work, business incorporation, use of additional drivers or helpers, or incentive based income, continue to be absent." Another factor in finding independent contractor status is whether the individuals enjoy certain freedoms and bear certain risks that are consistent with independent contractor status. That was present in *Dial-A-Mattress*, where most of the owner-operators owned multiple trucks (one owned 10 trucks), and some of the owner-operators negotiated separate arrangements with the employer, neither of which is true herein. In *Standard Oil Co.*, 230 NLRB 967, 972 (1977), the Board stated: "It is clear that unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound management practices, and to be able to take financial risks in order to increase their profits." That is certainly true herein. During their regular working hours, there is no element of entrepreneurial incentive for the drivers. They drive along the Respondent's route, and pick up passengers at the rate established by the Respondent, either for cash or for Respondent's discounted tickets sold by the Respondent at the terminals. None of the entrepreneurial elements present in *Dial-A-Mattress* are present here. Further, the nature of the Respondent's business makes it difficult to establish independent contractor status. The hours of work, the morning and evening rush hours, and the routes driven, between the Port Authority Bus Terminal and the Journal Square Terminal in Jersey City, New Jersey, leaves little room for entrepreneurial incentives or financial risks. Although it is true that the owner operators pay for, insure, and maintain their buses, and receive no pay or benefits from the Respondent, that is not enough to overcome the other factors discussed above. Finally, the fact that Pimentel had previously been disciplined by the Respondent is a further factor establishing employee status of the owner-operators. I therefore find that based upon all the factors

discussed above, the Respondent's owner-operators are employees under Section 2(3) of the Act, rather than independent contractors.

The initial substantive allegation is that Pimentel was discharged in retaliation for his union activities, as well as for his participation in the representation and unfair labor practice proceedings involving the Respondent, in violation of Section 8(a)(1), (3), and (4) of the Act. There can be no question about his union activities, and the Respondent's knowledge of them. He signed a union authorization card and gave cards to about 20 other employees. He was elected president of the employees' organizing group, attended the representation and unfair labor practice proceedings at the Board, and was present with the union representatives at the bargaining sessions with the Respondent. This allegation depends upon a credibility determination between Pimentel's testimony and Vidal's testimony. Pimentel testified that he went to the Respondent's facility on December 20, 2001, to speak to Bedoya to find out how much he would have to pay for insurance for 2002. He was unaware of the cost prior to the meeting and he met only with Bedoya, who never answered his question. Instead, he told Pimentel that he would not renew his insurance because of the trouble he made, and that he should get out of his office. On the other hand, Vidal testified that Pimentel came into the office that day and told her that he was not going to renew his insurance, presumably because of the increased cost. This is an easy credibility determination. Although Vidal was not an obviously incredible witness, I found Pimentel's testimony clearly more believable. In addition, as Bedoya, did not testify although he was subpoenaed to appear, it was rather "convenient" for Vidal to testify in an attempt to rebut Pimentel's testimony. Counsel for the Respondent, in cross-examining Pimentel, used the affidavit that he gave to the Board in an attempt to establish that prior to speaking to Bedoya, he saw a letter from the insurance carrier notifying a driver of the increase, to establish that he knew of the increase and was going to tell Bedoya that he was not going to renew his insurance. However, the affidavit does not say that he saw this letter prior to the meeting. Finally, as Pimentel had paid his corporation fee 2 weeks earlier, I find it highly unlikely that he went to the facility to tell Bedoya that he was not renewing his insurance and was, in effect, resigning.

In addition to the Respondent's knowledge of Pimentel's union activities, and its union animus as displayed in the prior manner, the timing is another factor establishing that Bedoya fired him on December 20, 2001, and that it was caused by his support for the Union and participation in the Board proceedings. The prior unfair labor practice case was heard on November 27 and December 10, 2001, and on December 10, 2001, 10 days prior to Pimentel's meeting with Bedoya, the Respondent withdrew its answer to the complaint. That would reinforce, in a timely manner, any animus toward the Union and Pimentel. For all of these reasons, I find that the Respondent fired Pimentel on December 20, 2001, in violation of Section 8(a)(1), (3), and (4) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

There are two distinct, and yet connected, allegations regarding Ocampo: first that the Respondent refused to allow him to use substitute drivers beginning on about May 17, and that as a result of his failure to use substitute drivers, the Respondent constructively discharged him on about November 20, in violation of Section 8(a)(1), (3), and (4) of the Act. Although Ocampo was not as active as Pimentel in supporting the Union, he signed a card for the Union and came to the Board office in March and May to attend the hearings. In addition, his uncontradicted testimony is that Bedoya called him a traitor and said that he was unappreciative, presumably because of his support for the Union and the Board proceedings. Based upon this statement, and Ocampo's attendance at the Board hearings, I do not credit Vidal's testimony that prior to Ocampo's filing the unfair labor practice charge, she was unaware of his union activities.

Ocampo's problem herein began with the insurance company's May 15 letter, which said that because of his driving record he was ineligible to drive any vehicle under the Respondent's insurance policy. It is important to note that counsel for the General Counsel does not question the good faith nature of this letter. Vidal followed up on the insurance company's letter by inviting Ocampo to contact her "to discuss the matter further." Ocampo came to the office with his wife and Guadalupe. Bedoya told him that he could not drive anymore according to their agreement with the insurance company. Ocampo claimed that his license was clean and that he would go to Trenton to prove it. Bedoya then said that he knew that he was in the Union, and that "what was happening was because [he] was with the terrorists and the Taliban." When Ocampo offered to get somebody to drive his bus, Bedoya first said that he wouldn't allow it because he was tired of having Taliban terrorists in the company, and then said that he could only use a driver from the company who was not in the Union.

Ocampo's credibility herein is somewhat compromised because in his meeting of May 17, he denies culpability for his driving record; yet counsel for the General Counsel is not questioning the good faith of the insurance company's letter canceling his insurance due to his poor driving record. On the other hand, because his testimony about Bedoya's statements about not wanting Taliban terrorists or Union at the company is supported by Guadalupe, who was a credible, disinterested witness, I credit this testimony. However, regardless of Bedoya's statements at the May 17 meeting, with a few exceptions, Guadalupe continued to drive for Ocampo every morning and Friday afternoons from that time until November, when Ocampo took his bus out of service. In addition, during this period of about 6 months, Salinas and Apolaya each drove for him for a period of about a month. Therefore, during the period from when the insurance company cancelled his insurance to the day that he took his bus out of Respondent's service, he had substitute drivers operating his bus for about 75 percent of the shifts.

This is an employer who is not subtle in opposing a union or his employees who supported the Union. In the prior matter he was found to have committed numerous violations of Section 8(a)(1), (3), and (5) of the Act after withdrawing its answer at the second day of hearing. In the instant matter, Bedoya called Ocampo a traitor and told Ocampo and Guadalupe that he didn't want Taliban terrorists or the Union at the company. Because of this mindset, I find that if the Respondent wanted to prevent Ocampo from obtaining substitute drivers for his bus, it

would have done so more directly and completely. That Ocampo employed substitute drivers for most of this period convinces me that Respondent did not restrict his ability to find substitute drivers, regardless of Bedoya's statement at the May 17 meeting, and I therefore recommend that this allegation be dismissed.

The final allegation is that Ocampo was constructively discharged on about November 20. Two elements must be proven in order to establish a constructive discharge:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Crystal Princeton Refining Co., 222 NLRB 1068, 1069 (1976); *Pioneer Recycling Corp.*, 323 NLRB 652 (1997). I find that counsel for the General Counsel has failed to establish the first of these elements. It should initially be repeated that the Respondent did not cause Ocampo's insurance problems. Further, although Bedoya told Ocampo that he didn't want Taliban terrorists or a union at his facility, he apparently did not otherwise unduly restrict Ocampo's ability to obtain substitute drivers, as he was able to keep his bus operating most of the time. Rather, it appears more likely that after paying the substitute drivers, the insurance and corporation fee, and the general maintenance and upkeep of the bus, Ocampo realized that he was losing money or, at least, was not making money as an owner-operator for the Respondent and for that reason took his bus out of service for the Respondent. I therefore recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent discharged Jesus Pimentel on about December 21, 2001 in violation of Section 8(a)(1), (3), and (4) of the Act.

3. The Respondent did not further violate the Act as alleged in paragraphs 10 and 11 of the complaint.

THE REMEDY

Having found that the Respondent unlawfully terminated Pimentel, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. As the Respondent discriminatorily discharged Pimentel on December 20, 2001, it must offer him reinstatement to his former position and make him whole for any loss of earnings and other benefits that he suffered as a result of the discharge, computed on a quarterly basis from the date of discharge to the date of a full offer of reinstatement to his former position, less any interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent Community Bus Lines/ Hudson County Executive Express, Jersey City, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the Union or for giving testimony under the Act.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jesus Pimentel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth above in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and within 3 days thereafter notify the employee in writing that it has done so and that it will not use the discharge against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Jersey City, New Jersey copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 21, 2001.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 12, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting a union or for filing unfair labor practices with, or giving testimony to, the National Labor Relations Board.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

WE WILL, within 14 days of the date of this Order, offer Jesus Pimentel full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights and privileges previously enjoyed, and WE WILL make him whole for any loss that he suffered as a result of the discrimination against him.

COMMUNITY BUS LINES/HUDSON COUNTY EXECUTIVE EXPRESS